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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re Nathalie A. et al., Persons Coming Under the Juvenile Court Law.	B219925 (Los Angeles County Super. Ct. No. CK67192)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. Valerie G. et al., Defendants and Appellants.	

APPEAL from the orders of the Superior Court of Los Angeles County, D. Zeke Zeidler, Judge. Affirmed.

John Cahill, under appointment by the Court of Appeal, for Defendant and Appellant Valerie G.

Ernesto Paz Rey, under appointment by the Court of Appeal, for Defendant and Appellant T.T.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Frank J. DaVanzo, Principal Deputy County Counsel, for Plaintiff and Respondent.

Valerie G. (mother) appeals from orders denying her petition under section 388 of the Welfare and Institutions Code[1] and terminating parental rights to Nathalie A. and Christian T. T.T. (father) appeals from orders denying his petition under section 388 and terminating parental rights to Christian. They contend denial of their section 388 petitions was an abuse of discretion and substantial evidence does not support the finding that termination of parental rights would not be detrimental to the children. We affirm.

FACTS AND PROCEDURAL HISTORY

Nathalie was born to mother and Danny A.[2] in 2001. Christian was born to mother and father[3] in February 2007.[4] Mother and father abused drugs. Father was convicted in 2004 of driving without a license and in 2005 of possession of more than one pound of marijuana. Nathalie's medical needs were neglected.

The children were detained by the Department of Children and Family Services (Department) shortly after Christian's pre-term birth, because Christian was born with methamphetamine in his system. Mother and father tested positive for amphetamine and methamphetamine.

On March 1, 2007, the dependency court ordered the Department to provide reunification services to parents. Parents were ordered to participate in drug counseling and random testing.

Father was arrested on March 8, 2007, and incarcerated for two months for a drug

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] Danny did not appeal.

[3] Father is Christian's presumed father.

[4] Mother has an older son, born when mother was 14 years old, who is not involved in this appeal. Mother lost custody of this child to his father when Nathalie and Christian were detained.

offense. He did not enroll in a drug program. Parents resided together.

The children were placed with the maternal great aunt and uncle on May 7, 2007. Nathalie shared a close and positive relationship with them, having seen them weekly since her birth.

On May 25, 2007, the children were declared dependents of the court based on sustained allegations under section 300, subdivision (b) (substantial risk of serious physical harm due to failure to adequately supervise and inability to provide regular care due to substance abuse). Parents were ordered to enroll in drug counseling, weekly testing, parenting, and individual counseling. They were granted twice-weekly monitored visitation, which the Department was given discretion to liberalize.

Father did not enroll in a drug treatment program, parenting, or individual counseling. He moved out of the home on July 18, 2007, because he was not ready to comply with the dependency court's orders. His visitation with Christian became inconsistent and then stopped.

In October 2007, intoxicated and holding a knife, father attacked mother, causing injuries to her neck and hands. In November 2007, father was arrested for fraud and violation of parole. Father had not complied with any of the court's reunification orders.

Reunification services for father were terminated on December 5, 2007.[5] He was released from prison in May 2008 but did not enroll in any rehabilitation programs.

On May 12, 2008, after mother completed a drug program, the dependency court returned the children to her, but the children were removed again after six months because she failed to enroll in individual counseling, submit to random drug testing, or maintain contact with the social worker. Moreover, she left the children to be cared for by maternal relatives while she resided with father. A supplemental petition (§ 387) was filed, alleging the previous disposition returning the children to home of mother was not effective in protecting the children.

On January 21, 2009, the section 387 petition was sustained, the home of parent

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[5] Father appealed the order. The order was affirmed on August 22, 2008. (*In re Christian T.*, B204580, opn. filed Aug. 22, 2008.)

order and family reunification services for mother were terminated, and the children were suitably placed with maternal great aunt and uncle. The matter was set for a section 366.26 hearing on May 12, 2009, to select and implement a permanent plan. Mother did not visit regularly, enroll in individual counseling, or drug test.

Father was returned to incarceration. When he was released on January 26, 2009, he was required to reside in an inpatient drug rehabilitation program for six months. He complied with the condition and graduated from his program on July 29, 2009. On August 7, 2009, he enrolled in an outpatient program of individual drug counseling and random drug testing. He attended four individual drug counseling sessions and no individual therapy sessions to address his case issues. He visited twice a month from February 2009 through July 2009, once in August, and not at all in September 2009. He did not maintain telephone contact with Christian. Mother brought Christian to see father at work in September in violation of the social worker's instructions.

In June 2009, after not attending individual therapy for 14 months, not drug testing for 9 months, and not consistently visiting or maintaining telephone contact for 5 months,[6] mother enrolled in individual counseling and began visiting once a week in public locations. She began submitting to random drug testing and attending a 12-step program. Her visits were monitored. The children were not upset when visits ended.

Maternal great aunt and uncle wanted to adopt the children. They loved them and wanted to provide a stable, nurturing, and permanent home. The children were very bonded with the maternal great aunt and uncle. Nathalie wanted to live with them.

On August 31, 2009, mother filed a section 388 petition asking the dependency court to vacate the order of May 12, 2009, which confirmed the setting of the section 366.26 hearing for August 31, 2009, and to reinstate reunification services or place the child in home-of-mother. She alleged circumstances had changed in that "the risk of harm [of placing the children with mother] has been mitigated. As an alternative, the children would be best served having mother in reunification services with the opportunity for reunification." Exhibits attached to the petition indicated the following:

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[6] She visited the children an average of one and a half times per month.

on June 12, 2009, mother enrolled in an outpatient drug treatment program that can last from three to six months; a progress report from the treatment program prepared on August 28, 2009, indicated mother had attended ten sessions and was cooperative and active but did not indicate when mother would complete the program; and on June 12, 2009, mother began testing clean and attending a 12-step program three to four times a month. Moreover, in June 2009, mother enrolled in a program to become a drug counselor.

On September 8, 2009, father filed a section 388 petition asking the dependency court to change the order of December 5, 2007, terminating reunification services and the order of January 21, 2009, setting a section 366.26 hearing. He wanted the court to grant reunification services, order unmonitored visits, order overnight visits, grant a home-of-father order, and/or vacate the section 366.26 hearing. He alleged exhibits attached to the petition showed circumstances had changed in that he: completed a six-month residential drug program in late July 2009 and was currently enrolled in an outpatient program; completed parenting classes; tested clean; and visited Christian twice a month from February 2009 through July 2009 and once a week during August 2009. The conditions of his probation required him to call in every day starting in August 2009 to find out if he had to be drug tested. He alleged the change of order would be in Christian's best interest because he resolved the issues that brought the case into the system, Christian would be safe and loved in father's care, and Christian had a close relationship with father.

The dependency court set parents' section 388 petitions for a hearing. Mother and father lived together.

The hearing on the section 388 petitions was held on October 27, 2009. Mother argued that she dropped out of her programs but returned to them on June 12, 2009, and was doing well. "[A]lbeit late, [mother] has started." However, mother had not participated in individual therapy addressing her issues since May 2008. The dependency court denied the petitions, finding circumstances had not changed such that changing the orders was in the children's best interests. Father had over a year of reunification services and was inconsistent with visits; his visits were still monitored. Although father

now participated in programs, further reunification services were not in Christian's best interest. Mother's visits were still monitored. Circumstances had not sufficiently changed to allow the children to be returned to mother "without liberalizing [visitation] first and tracking how that goes." Reinstatement of reunification services for mother was not in the children's best interests, as mother had previously had another child in the system whose case closed with an out-of-home custody order, and she was sporadic in her compliance with her programs.

A contested section 366.26 hearing followed the section 388 hearing. The dependency court made a finding that the exception to termination in section 366.26, subdivision (c)(1)(B)(i) (termination detrimental due to regular contact and benefit) did not apply and terminated parental rights. Parents were starting to make progress and to visit more regularly. However, "[t]he problem with this case is that the father took quite some time to finally get to this stage and the mother actually had the children returned to her within two months. [A section] 387 petition was . . . filed and they were . . . removed again. The court attempted to work towards getting the children back to the parents at that time. November 18th at a detention hearing, I made a family preservation referral in the hopes that we could get the kids back to the parents, that turned out to be an adjudication date [in] January, and that was not possible. The mother ended up being sporadic in her visits. At that time father was incarcerated, then sporadic in his visits, and the kids can't wait repeatedly for the parents to once and for all get their act together in a way that everyone knows is once and for all successful. [¶] . . . [Visitation] might have been consistent in that it was twice a month, but that was not really consistent, it was really sporadic. The mother has really not had a parental role in the children's life since last January. Father has not been consistent. The father never has had a parental role and relationship in Christian's life. . . . To the extent that the mother and [father] have had regular and consistent visitation and contact, the reality is that none of these parents at this point have a parental role and relationship in their children's lives, especially not one that would outweigh the benefit of permanence in adoption."

DISCUSSION

Denial of Parents' Section 388 Petitions Was Not an Abuse of Discretion

Parents contend denial of their section 388 petitions was an abuse of discretion. We hold that the dependency court did not abuse its discretion.

Under section 388,[7] the dependency court should modify an order if circumstances have changed such that it would be in the child's best interest for the modification to be made. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526 & fn. 5.) "Whether a previously made order should be modified rests within the dependency court's discretion, and its determination will not be disturbed on appeal unless an abuse of discretion is clearly established." (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1704.) "'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' [Citation.]" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.) Abuse of discretion is established if the determination is not supported by substantial evidence. (*Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 796.) In determining whether substantial evidence supports the factual findings, "all intendments are in favor of the judgment and [we] must accept as true the evidence which tends to establish the correctness of the findings as made, taking into account as well all inferences which might reasonably have been drawn by the trial court." (*Crogan v. Metz* (1957) 47 Cal.2d 398, 403-404.) The party requesting the change of order has the burden of proof. (Cal. Rules of Court, rule 5.570(h)(1); *In re Michael B.*, *supra*, at p. 1703.)

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[7] Section 388 provides in pertinent part that a parent "may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made . . . . [¶] . . . [¶] If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held[.]"

Once reunification services are terminated, the focus shifts from reunification to the child's need for permanency and stability, and a section 366.26 hearing to select and implement a permanent plan must be held within 120 days. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) For a parent "to revive the reunification issue," the parent must prove under section 388 that circumstances have changed such that reunification is in the child's best interest. (*Id.* at pp. 309-310.) "[O]ur Supreme Court made it very clear in [*In re Jasmon O.* (1994) 8 Cal.4th 398, 408, 414-422] that the disruption of an existing psychological bond between dependent children and their *caretakers* is an extremely important factor bearing on any section 388 motion." (*In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 531.)

"In deciding what services or placement are best for the child, time is of the essence. 'After reunification efforts have failed, it is not only important to seek an appropriate permanent solution—usually adoption when possible—it is also important to *implement* that solution reasonably promptly to minimize the time during which the child is in legal limbo. . . . Courts should strive to give the child [a] stable, permanent placement, and [a] full emotional commitment, as promptly as reasonably possible consistent with protecting the parties' rights and making a reasoned decision.' [Citations.] 'It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current "home," under the care of his parents or foster parents, especially when such uncertainty is prolonged.' [Citation.]" (*In re Josiah Z.* (2005) 36 Cal.4th 664, 674.)

With certain exceptions, parents of children under the age of three years when detained have six months to reunify, and parents of children who are three years or older when detained have 12 months. (§ 361.5, subd. (a)(1) (A), (B).) "While [the months that must pass before a section 366.26 hearing is held] may not seem a long period of time to an adult, it can be a lifetime to a young child. Childhood does not wait for the parent to become adequate." (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 310.)

A. Father's Petition

Father contends denial of his request for further reunification services was an abuse of discretion. There was no abuse of discretion.

When the dependency court terminated father's reunification services in December 2007, father had never had Christian in his custody or played a parental role, did not visit regularly, did not have unmonitored visits, had not resolved his substance abuse problem, and was incarcerated. When the dependency court ruled on his section 388 petition nearly two years later, father still was not playing a parental role, was not visiting regularly or frequently, had not graduated beyond monitored visits, was in the process of resolving but had not resolved his substance abuse problem, and was on probation. Removed from parents as an infant, Christian was in the dependency system for more than two and a half years. The statutory time for reunification had expired. (§ 361.5, subd. (a)(1).) Father never provided Christian with a home and Christian had no relationship with father. In contrast, Christian had a loving, bonded relationship with maternal great aunt and uncle, who had cared for and nurtured him for two years and wanted to adopt him. Disrupting an existing psychological bond with caretakers is not in a child's best interest. (*In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 531.) This is substantial evidence that circumstances had not changed such that delaying permanency by restarting reunification services for father was in Christian's best interest.

Father's contention that the quality and consistency of his visits when Christian was in home of mother a year before his section 388 hearing compels the conclusion Christian will benefit from maintaining the parental relationship, is a request we reweigh the evidence. This we will not do. (See, e.g., *Scott v. Pacific Gas & Electric Co.* (1995) 11 Cal.4th 454, 465.) Because there was substantial evidence circumstances had not changed such that further reunification services were in Christian's best interest, denial of father's section 388 petition was not an abuse of discretion.

B. Mother's Petition

Mother contends it was an abuse of discretion to deny her request for return of the children to her custody. We disagree.

The following circumstances existed in January 2009 when reunification services for mother were terminated and the matter set for a section 366.26 hearing. She had completed a drug rehabilitation program and the children were returned to her custody. However, she failed to continue drug testing, did not enroll in individual counseling, and left the children in the care of others so that she could live with father. After the children were re-detained in January 2009, she visited infrequently and did not start to address her issues again until June 2009. When the dependency court ruled on her section 388 petition, mother's visits were monitored, infrequent, and in public locations. She played no parental role, whereas the children were bonded in a stable home, where they wanted to live, with maternal relatives who wanted to adopt them. Mother had not completed another drug program or individual counseling to address her issues, and she provided no information about how long it would take for her to complete rehabilitation. There was thus much uncertainty whether mother would be able to maintain stability and sobriety. Moreover, granting the petition would delay permanency for children whose status had been in limbo for over two and a half years. They could not be returned to mother's custody without a period of supervised transition whose outcome was doubtful. Time is of the essence when it comes to securing a stable, permanent home for children; prolonged uncertainty is not in their best interest. (*In re Josiah Z., supra*, 36 Cal.4th at p. 674.) Thus, substantial evidence supports the conclusion that circumstances had not changed such that return of the children to mother's custody was in the children's best interests. The dependency court's denial of mother's section 388 petition was not an abuse of discretion.

Substantial Evidence Supports the Finding That the Exception in Section 366.26, subdivision (c)(1)(B)(i) Does Not Apply

Parents contend substantial evidence does not support the finding under section 366.26, subdivision (c)(1)(B)(i), that termination of parental rights would not be detrimental to the children. We disagree with the contention.

Because parents' contention asserts insufficiency of the proof, we apply the substantial evidence rule. (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576; compare *In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449 [abuse of discretion standard of review].)[8] If supported by substantial evidence, the judgment or finding must be upheld, even though substantial evidence may also exist that would support a contrary judgment and the dependency court might have reached a different conclusion had it determined the facts and weighed credibility differently. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.) Thus, the pertinent inquiry when a finding on the section 366.26, subdivision (c)(1)(B)(i), exception is challenged is whether substantial evidence supports the finding, not, as parents argue, whether a contrary finding might have been made. "We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court. [Citations.] '"[T]he [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses

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[8] "The practical differences between the two standards of review are not significant. '[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only "'if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did.' . . ."' [Citations.] However, the abuse of discretion standard is not only traditional for custody determinations, but it also seems a better fit in cases like this one, especially since the statute now requires the juvenile court to find a 'compelling reason for determining that termination would be detrimental to the child.' (§ 366.26, subd. (c)(1)[(B)].) That is a quintessentially discretionary determination. The juvenile court's opportunity to observe the witnesses and generally get 'the feel of the case' warrants a high degree of appellate court deference." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

substantial evidence . . . such that a reasonable trier of fact could find [that the order is appropriate].'" [Citations.]" (*In re Matthew S.* (1988) 201 Cal.App.3d 315, 321; see also *In re Dakota H*, *supra*, 132 Cal.App.4th at p. 228 ["[w]e do not reweigh the evidence"].)

Under section 366.26, subdivision (c)(1)(B)(i), if reunification services have been terminated and the child is adoptable, the dependency court must terminate parental rights unless it "finds a compelling reason for determining that termination would be detrimental to the child due to [the circumstance that the parent has] [¶] . . . maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." The parent has the burden to prove the applicability of the exception. (*In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1373.)

"'Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability.' [Citation.] . . . 'The Legislature has declared that California has an interest in providing stable, permanent homes for children who have been removed from parental custody and for whom reunification efforts with their parents have been unsuccessful.' [Citation.]" (*In re Celine R.* (2003) 31 Cal.4th 45, 52-53.) "At this stage of the proceedings, if an appropriate adoptive family is or likely will be available, the Legislature has made adoption the preferred choice. [Citation.]" (*Id.* at p. 49; see also § 366.26, subd. (b)(1) [adoption is the preferred plan].) "At this stage of the dependency proceedings, 'it becomes inimical to the interests of the [child] to heavily burden efforts to place the child in a permanent alternative home.' [Citation.] The statutory exceptions merely permit the court, in *exceptional circumstances* [citation], to choose an option other than the norm, which remains adoption." (*In re Celine R.*, *supra*, at p. 53.)

"[T]he exception does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.) The type of parent-child relationship that triggers the exception is a relationship which "'promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a

permanent home with new, adoptive parents. . . .' [Citation.]" (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534; accord, *In re Jasmine D., supra,* at pp. 1347-1350.)

Substantial evidence supports the finding that no exceptional circumstances existed under section 366.26, subdivision (c)(1)(B)(i), that required depriving the children of a permanent, adoptive home. Regarding the first prong of the exception—maintenance of regular contact and visitation—the children were out of mother's care for over two years and Christian was out of father's care for over two and a half years. By his infrequent visitation and periods of incarceration, father did not take advantage of the opportunity dependency court's orders gave him to develop a parental relationship with Christian. By leaving the children in the care of others when she had custody, and not visiting as often and regularly as the dependency court allowed, mother did not maintain a parental relationship with the children. At the time of the hearing, parents' visits were monitored and sporadic. Father visited an average of one and a half times per month after his most recent release from incarceration, and mother went from one and a half visits per month and inconsistent telephone contact to one visit per week in public places during the year before the hearing. This is substantial evidence the parents did not maintain regular contact and visitation.

Regarding the second prong—that the children would benefit from continuing the relationship—substantial evidence establishes that parents' relationship with the children did not promote the children's well-being "'to such a degree as to outweigh the well-being [the children] would gain in a permanent home with new, adoptive parents. . . .' [Citation.]" (*In re Brandon C., supra,* 71 Cal.App.4th at p. 1534.) Father did not begin to work on rehabilitating himself until late in proceedings. Mother has a history of losing custody of all her children. At the time of the hearing, parents had not completed rehabilitation, and given their histories, the outcome of their rehabilitation efforts was uncertain. The children had spent over two years in maternal relatives' custody, waiting for mother and father to become adequate parents. Maternal relatives were loving and nurturing, the children wanted to live there, and the relatives were committed to providing permanency. The children were not upset at the end of mother's visits. The

conclusion reached by the dependency court that termination of parental rights would not be detrimental is amply supported by substantial evidence.

DISPOSITION

The orders are affirmed.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.